

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| JASON BONTRAGER AND MELANA GONYEA | : | SMALL CLAIMS DETERMINATION DTA NO. 820455 |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 17, Title 11 of the Administrative Code of the City of New York for the Year 1999. | : | |

Petitioners, Jason Bontrager and Melana Gonyea, 901 Jackson Avenue, Saint Charles, Illinois 60174, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 17, Title 11 of the Administrative Code of the City of New York for the year 1999.

On October 28, 2005 and November 2, 2005, respectively, petitioners by Erwin & Associates LLC (James A. Erwin, Esq., of counsel) and the Division of Taxation by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel), waived a small claims hearing and agreed to submit this matter for determination based upon documents and briefs. The final brief in this matter was due by February 20, 2006, and it is this date that triggers the three-month period for issuance of this determination. After due consideration of the evidence and arguments submitted, James Hoefer, Presiding Officer, renders the following determination.

ISSUE

Whether petitioners have established that they changed their New York State and City domicile to Illinois on August 1, 1999, and not August 6, 1999 as asserted by the Division of Taxation, thereby rendering a \$248,138.00 distributive share of partnership long-term capital gain received by petitioners from the partnership's August 4, 1999 sale of real property located in Washington State as having been earned in petitioners' nonresident period and thus nontaxable to New York.

FINDINGS OF FACT

1. Petitioners, Jason Bontrager and Melana Gonyea, are husband and wife who were married in 1999 on some undisclosed date after August 1, 1999. For the year in question, petitioners were domiciled in and taxable as residents of the State and City of New York from January 1, 1999 until either August 1, 1999 or August 6, 1999.

2. Petitioner Jason Bontrager, who turned 25 years old in 1999, was employed as a senior consultant by the accounting firm of Deloitte & Touche LLP. A letter from Deloitte & Touche LLP dated February 5, 2003 indicates that petitioner Jason Bontrager "joined the New York office of Deloitte & Touche effective September 14, 1998. He transferred to the Chicago office effective July 25, 1999. Mr. Bontrager was employed as a Senior Consultant and his employment ended on August 26, 2000." Prior to his move to Illinois, petitioner Jason Bontrager maintained an apartment at 83-55 Lefferts Boulevard, Apt. 6E, Kew Gardens, New York.

3. Petitioner Melana Gonyea, who turned 24 years old in 1999, finished her education at Hofstra University in 1999. For the 1999 tax year, Ms. Gonyea earned wage income of \$4,991.00 from two separate employers, all of which was received during the period she was a

domiliciary and resident of the State and City of New York. Prior to her move to Illinois, petitioner Melana Gonyea maintained an apartment at 83-44 Lefferts Boulevard, Apt. 4C, Kew Gardens, New York.

4. Throughout all of 1999 petitioner Melana Gonyea was a limited partner in the Gonyea Family Limited Partnership (hereinafter “the partnership”). The partnership’s address in 1999 was 16420 143rd Street NE, Woodinville, Washington, and it had no office or assets nor did it conduct any business within the State and City of New York during the 1999 tax year. On August 4, 1999, the partnership closed on the sale of real property located at 17520 147th Street SE, Monroe, Washington. The partnership’s sale of this real property produced a sizable gain pursuant to Internal Revenue Code § 1231 (sale of property used in a trade or business) and petitioner Melana Gonyea’s \$248,138.00 distributive share of the IRC § 1231 gain was reported on petitioners’ 1999 Federal Schedule D as a long-term capital gain. As relevant to this proceeding, the following table reflects petitioner Melana Gonyea’s distributive share of partnership income as reported on her Federal Schedule K-1 for 1999:

| ITEM | AMOUNT |
|-----------------------------|--------------|
| Ordinary income | \$7,823.00 |
| Interest | 790.00 |
| Ordinary dividends | 1,659.00 |
| Net short-term capital gain | 4.00 |
| Net long-term capital gain | 1,003.00 |
| Net section 1231 gain | 248,138.00 |
| Total | \$259,417.00 |

5. Petitioners filed a timely joint 1999 New York State and City Nonresident and Part-Year Resident Income Tax Return with the Division of Taxation (“Division”) on April 14, 2000.

On said return, petitioners indicated that they were part-year residents of the State and City of New York; that the date of their last move was August 6, 1999 and that they earned no income from State and City sources during their nonresident period. The following table contains each item of income and adjustment to income included by petitioners in the computation of their 1999 Federal adjusted gross income and the amount reported on their New York return as attributable to New York State and City sources:

| ITEM | FEDERAL | NYS/NYC |
|-----------------------|--------------|------------|
| Wage income | \$65,281.00 | \$8,643.00 |
| Interest income | 849.00 | 59.00 |
| Dividend income | 1,658.00 | -0- |
| Capital gain income | 249,145.00 | -0- |
| Partnership income | 7,823.00 | -0- |
| Total income | 324,757.00 | 8,702.00 |
| Less moving expenses | 750.00 | 750.00 |
| Adjusted gross income | \$324,007.00 | \$7,952.00 |

6. In late September 2002, the Division commenced an examination of petitioners' 1999 New York State and City income tax return focusing primarily on the taxable status of petitioner Melana Gonyea's \$259,417.00 distributive share of partnership income. After reviewing the documents submitted by petitioners, the Division concluded that petitioners had not shown that they changed their residence from New York to Illinois on August 1, 1999, as they now allege, as opposed to the August 6, 1999 date reported on their 1999 New York return. Accordingly, the Division determined that the \$259,417.00 of partnership income should, in accordance with the Tribunal's decision in *Matter of Greig* (Tax Appeals Tribunal, September 16, 1999), be allocated to New York State and City sources based on the number of days petitioners were

residents of the State and City. The Division held that of the \$259,417.00 of total partnership income received by petitioners in 1999, \$150,675.08 was taxable to the State and City of New York. The portion of total partnership income attributable to petitioners' resident and nonresident periods was computed by the Division in the following manner:

Step 1 (Resident Period)

212 (number of days from 1/1/99-7/31/99)

$$212/365 \times \$259,417.00 = \$150,675.00$$

Step 2 (Nonresident Period)

$$153/365 \times \$259,417.00 \times 0\% = \$0.00$$

Although the Division used July 31, 1999 as the ending date for petitioners' resident period for purposes of allocating partnership income, it maintains that it used this date solely for ease of computation and that it does not concede that petitioners actually changed their domicile on this date.

7. The Division also proposed other adjustments, such as increasing the amount of wage income earned in the State and City by petitioner Jason Bontrager during the resident period,¹ the disallowance of the \$750.00 moving expense adjustment as an item attributable to New York sources and the allowance of a resident tax credit for income taxes paid to Connecticut. Petitioners do not contest these three adjustments and therefore they will not be addressed hereinafter.

8. On April 19, 2004, the Division issued a Notice of Deficiency to petitioners asserting that \$16,878.83 of additional New York State and City personal income tax was due for 1999, together with interest of \$5,058.74, for a total amount due of \$21,937.57. Petitioners disagreed

¹ The Division actually understated its adjustment for wage income attributable to New York sources by \$4,991.00. In determining the amount of petitioner Jason Bontrager's New York sourced wages the Division erroneously included and gave him credit for the New York wages of petitioner Melana Gonyea.

with the Division's position that a portion of the partnership income should be allocated to their resident period and this small claims proceeding ultimately ensued.

9. At the start of the audit, petitioners, at the Division's request, completed and submitted a "Nonresident Audit Questionnaire." On page 2 of the Nonresident Audit Questionnaire (Question 5) petitioners indicated that they owned, rented, leased or otherwise maintained living quarters in New York State and, as requested, they supplied the respective address for each of their separate New York City apartments. When listing their separate New York City addresses each petitioner made the following notation "(1/1/99 - 8/6/99)." Page 3 of the Nonresident Audit Questionnaire contains both petitioners' signatures below the statement "I declare that the above statements are true, correct and complete to the best of my knowledge and belief."

10. On June 25, 1999, petitioners entered into a lease for an apartment located at 4657 N. Beacon Street, Apt. 3, Chicago, Illinois. The lease ran for a period of one year starting August 1, 1999 and ending on July 31, 2000. Petitioners subsequently moved to an apartment located at 1801 W. Larchmont Ave., Chicago, Illinois, before moving to their current location in Saint Charles, Illinois.

11. Petitioners' Illinois Individual Income Tax Return for 1999 reported that they were part-year residents of Illinois and that they lived in Illinois from "08/1999 to 12/1999." The Illinois tax return for 1999 did not require petitioners to list the specific date that they became residents of Illinois. On their joint Illinois tax return petitioners reported wages of \$27,156.00 as being the only item of income which was derived from and taxable to Illinois. None of petitioner's Melana Gonyea's distributive share of partnership income was reported as income subject to tax on their 1999 Illinois income tax return.

SUMMARY OF THE PARTIES' POSITIONS

12. Resolution of the controversy at issue turns solely on the determination of the date that petitioners changed their domicile from New York to Illinois. The Division concedes that if it is found that petitioners “were no longer residents of New York on August 4, 1999, the Division could not impose tax on any of the gain” (Division’s letter brief, p.4). Petitioners assert that they have adduced sufficient evidence to establish that they changed their New York State and City domicile to Illinois on August 1, 1999 and that therefore no portion of the \$248,138.00 gain realized from the partnership’s August 4, 1999 sale of real property located in Washington State is taxable to New York. Both parties have focused their attention on the taxable status of the \$248,138.00 IRC § 1231 gain generated from the partnership’s August 4, 1999 sale of real property in Washington State. It is noted, however, that the Division’s computation of partnership income attributable to New York sources includes not only the \$248,138.00 IRC § 1231 gain, but also petitioner Melana Gonyea’s distributive share of partnership income for ordinary income (\$7,823.00), interest income (\$790.00), ordinary dividends (\$1,659.00), short-term capital gain (\$4.00) and long-term capital gain (\$1,003.00). Since no argument has been presented with respect to the taxable status and allocation to New York of these five items of partnership income, it will be assumed, for purposes of this determination, that the Division’s Notice of Deficiency properly taxed and allocated these five items of partnership income to New York.

13. Petitioners maintain that the letter dated February 5, 2003 from Deloitte & Touche LLP and the lease agreement dated June 25, 1999 represent third-party, independent and unrefuted written evidence that they changed their New York domicile to Illinois on August 1, 1999, and not August 6, 1999 as reported on their 1999 New York tax return and the

Nonresident Audit Questionnaire. While petitioners recognize that their position that the correct date of their change of domicile was August 1, 1999 conflicts with their initial statements, it is their position that the initial statements were understandable given that the New York return asks for the “Date of last move.” Petitioners assert that although they physically moved to Illinois on the weekend of July 31, 1999, they did so in a hurry and left many items stored in New York. Petitioners claim that they returned to New York the following weekend, August 6, 1999, to move the remainder of their possessions to Illinois.

Petitioners also maintain that some of the documents requested by the Division had been lost or misplaced since they had moved twice more since their initial move to Illinois. Furthermore, petitioners note that their ability to produce additional documentary evidence was hampered in that the Division did not commence its audit until the fall of 2002, some two and one half years after the 1999 New York return was filed.

14. The Division argues that there is contradictory evidence in the record as to the exact date of petitioners’ change of domicile to Illinois; that the evidence adduced by petitioners is simply insufficient to clearly establish that petitioners moved to Illinois on August 1, 1999 and that petitioners have therefore failed to carry their burden of proof in this matter.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 605(b)(1) defines a resident individual as one:

(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state

B. While the Tax Law does not contain a definition of “domicile,” a definition is provided in the Division’s regulations (20 NYCRR 105.20[d]) which states as follows:

Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.

* * *

(4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive.

C. The distinction between domicile and residency was explained many years ago by the Court of Appeals in *Matter of Newcomb's Estate* (192 NY 238, 250):

Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

It is well established that an existing domicile continues until a new one is acquired and the burden of proof to show a change in domicile rests upon the party alleging the change (*id.*). Whether there has been a change of domicile is a question "of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals" (*id.* at 250). It is frequently stated that the test of intent with regard to a purported

new domicile is “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343, *affd* 267 App Div 876, 47 NYS2d 134, *affd* 293 NY 785); *see, Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138).

D. In the instant matter, the parties do not dispute that petitioners changed their domicile from New York to Illinois in 1999; the dispute herein concerns whether the change of domicile occurred on August 1, 1999 or August 6, 1999. Since Tax Law § 689(e) places the burden of proof on petitioners, they must establish the specific date in 1999 that they changed their domicile from New York to Illinois.

E. After careful consideration of the record before me, I cannot find that petitioners have presented clear and convincing evidence that their change of domicile occurred on August 1, 1999 as alleged. The letter from petitioner Jason Bontrager’s employer that he “transferred to the Chicago office effective July 25, 1999” falls well short of establishing that he actually started working in Chicago on this date. While he may have indeed started working in Chicago on July 25, 1999, it is equally plausible that the effective date of the transfer was July 25, 1999 and that Mr. Bontrager took two weeks of vacation time to complete his move to Illinois. Also, while the lease on their Chicago apartment was effective August 1, 1999, it does not establish that petitioners actually moved into the apartment on this date. Petitioners were aware of the Division’s position that, in its opinion, these documents were insufficient to establish the exact date of their change of domicile to Illinois, yet, they chose not to present any testimony or additional supporting evidence.

It is also noted that while petitioners assert that they physically moved to Illinois on the weekend of July 31, 1999 and returned to New York on the following weekend, August 6, 1999,

to retrieve the balance of their belongings, such assertion is first made in their brief and there is absolutely no evidence, through testimony, affidavits or other evidence, to support this allegation. Petitioners' entire case rests on the letter from Deloitte & Touche LLP and the lease dated June 25, 1999, effective August 1, 1999. In lieu of appearing at the small claims hearing scheduled for October 19, 2005, petitioners elected to submit this matter for determination based upon documents and briefs. Without testimony or affidavits to address the valid concerns raised by the Division concerning the adequacy of the two pieces of evidence adduced by petitioners, I cannot find that petitioners have met their burden of proof with clear and convincing evidence to show that their change of domicile occurred on August 1, 1999 and not August 6, 1999.

F. While petitioners profess not to understand or contemplate the various legal nuances of residency requirements, it must be noted that petitioner Jason Bontrager was employed as a senior consultant by a large well-known accounting firm. Furthermore, the fact that petitioners did not report any of the partnership income as taxable to Illinois does not reflect favorably on their position. Petitioners cannot reasonably posit that the entire \$259,417.00 of partnership income is not taxable to either New York or Illinois, the only two states in 1999 in which they could be considered domiciliaries. New York has taxed only \$150,675.00 out of \$259,417.00 of total partnership income, or 58.1%, and it appears that the remaining 41.9% has escaped taxation at the state level.²

² It would appear to me that the Division could have made a valid argument that, pursuant to the Tribunal's decision in *Matter of Greig (supra)*, the entire \$248,138.00 gain on the partnership's sale of real property should be accounted for directly, i.e., reflecting the actual date of receipt. Since the partnership's sale occurred in petitioners' New York resident period, it could be reasonably asserted that the \$248,138.00 gain was taxable in full for State and City income tax purposes. Interestingly, this is the same theory that petitioners advance, and the Division accepts, to argue that none of the \$248,138.00 gain is taxable to the State and City of New York if it is determined that they changed their New York domicile to Illinois on August 1, 1999. The balance of the partnership income, as noted in Finding of Fact "12", would be allocated based on the number of days in petitioners' resident period over the total number of days in the year.

G. The petition of Jason Bontrager and Melana Gonyea is denied and the Division of Taxation's Notice of Deficiency dated April 19, 2004 is sustained, together with such interest as maybe lawfully due and owing.

DATED: Troy, New York
May 11, 2006

/s/ James Hoefer
PRESIDING OFFICER